No. 15,667

United States Court of Appeals

For the Ninth Circuit

LORENZO WHITE, JOYCE HARPER and RUBY FIELDS,	*Appellants,*
vs.	
UNITED STATES OF AMERICA,	*Appellee.*

Appeal from the District Court for the District of Alaska, Fourth Division.

BRIEF FOR APPELLANTS.

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JURISDICTION.

The jurisdiction of the District Court was invoked under the Act of June 6, 1900, Chapter 786, Section 4, 31 Statutes 322 as amended (48 U.S.C.A. Section 101). The jurisdiction of the Court of Appeals rests on Sections 1291, 1294 of 28 U.S.C., and the Federal Rules of Criminal Procedure.

JUDGMENT BELOW.

Judgment was entered in the District Court at Fairbanks, Alaska, on the 6th day of June, 1957,

against Appellants (TR 18-20-22), based upon verdicts rendered by the jury (TR 12-13-14) on the 9th day of May, 1957. Motion for judgment notwithstanding the verdict and motion for new trial (TR 15) was denied June 3, 1957 (TR 16).

STATEMENT OF FACTS.

The Appellants herein were indicted in a Superceding Indictment (TR 3) by the Grand Jury for the Fourth Division, District of Alaska, on the 25th day of May, 1956, as follows:

Count I—that said Appellants did feloniously send, ship, carry and deliver Heroin, from the State of California to the Territory of Alaska, with Appellants White and Harper having aided and abetted the mailing of the package in violation of Section 4724(b) of the Internal Revenue Code of 1954.

Count II—that said Appellants knowingly transported a narcotic drug, to-wit, Heroin which had been imported into the United States contrary to law by Ruby Fields having mailed the package to the Fairbanks Post Office and the other two Appellants having aided and abetted the mailing and delivery in violation of Section 2 of the Narcotics Drug and Import Act, being the act of February 9, 1909, 35 Stat. 614, as amended, 21 U.S.C. 174.

Count III—alleges a conspiracy between Appellants and others.

Count IV—alleges that Ruby Fields deposited the Heroin for mailing from California to Fairbanks,

Alaska, contrary to Title 18, U.S.C.A. Section 1716, regarding the mailing of poisonous drugs.

Count V—charges Appellants with conspiracy to mail a poisonous drug under Title 18 U.S.C.A. 371.

The government charged that the package containing the heroin and the heroin itself was the property of the Appellants herein. No direct opportunity to deny this was afforded the appellants either before, or until nearly the end of the trial.

Appellants at no time prior to trial claimed the package (TR 46) and were therefore not in position to move for its suppression as evidence. The earliest opportunity arose when the government offered a part of the package into evidence (TR 125). At (TR 127) Mr. Hepp for the then defendants stated "I submit to the Court that even Congress can make no law allowing the opening of packages or mailing matter for an unlawful search." And at (TR 128) the Court stated "it will be understood that this one objection was lodged against each and all of the Identifications."

At (TR 139) Mr. McNealy moved for the exclusion of the package and all items it contained because there had been an unlawful search and seizure without a warrant.

The testimony of government witness, Robert Thompson, a U. S. Deputy Marshal (TR 44-48) clearly shows that it instructed the Fairbanks Postmaster to be on the lookout for a certain package, and when the package did arrive he went to the

office of Mrs. Boyle, the Postmaster and the package containing the heroin was opened in his presence and that of the U. S. Marshal, Mr. Dorsch, and without a warrant.

Mrs. Boyle also testified to manner in which the package was opened (TR 72-73). No positive proof as to the weight of the package could be given by Mrs. Boyle who stated a mere conclusion that "if the postage was $2.60, it probably weighed about three pounds at 80¢ a pound and possibly 20¢ insurance fee. She stated that it had to be fourth class mail to be insured (TR 76). At (TR 71) it was established this package arrived by way of airmail.

At (TR 146) Mr. McNealy for Appellants again raised the issue of having to move to suppress evidence not claimed by any party in order to protect the record. Also put in issue was the unlawful bringing in of Federal Marshals to open mail without a warrant and if the Post Office has the right to search a package the right is not also extended to U. S. Marshals or other government officials.

At (TR 155) Mr. Hepp moved to suppress evidence, again at (TR 157) and again as to the heroin (TR 159).

Mr. Hepp moved for a directed verdict of aquittal and argued at length on the failure of the government to prove a conspiracy involving Lorenzo White or Joyce Harper (TR 203-216).

At (TR 216-217) Mr. McNealy again urged the unlawful search despite no admission that the package belonged to any of the defendants.

At (TR 218) the Court denied the motions for judgment of acquittal which we assume also disposes of the motions to suppress evidence.

The surprise feature came the closing afternoon of the trial when Appellant, Ruby Fields took the stand as what had been planned to be the first defendant to testify. At (TR 221-223) Ruby Fields admitted to ownership of the package and the heroin and to its mailing, but denied the other then defendants were implicated with her.

At (TR 234) Mr. McNealy again moved to suppress Exhibits F, I, H, E, D, G, J and K, being the package in dispute and its contents. The motion was denied.

EVIDENCE.

This cause evolves around a package containing, among other things, heroin, mailed from Los Angeles, California, by the Appellant Ruby Fields to a Myrtle Hicks in Fairbanks, Alaska. Miss Fields stated the heroin was for her own use and certainly no commercial quantity was discovered, there being only 7.65 grams of the heroin (TR 158).

The package containing the heroin consisted of Exhibits D, E, F, G, H, I, J and K.

Nowhere is there any evidence that Appellants, White and Harper knew that the package contained heroin, even if the testimony of the cab drivers Clyde Jenkins (TR 103), Willie Stanton (TR 90) and William Thomas Taylor (TR 98) is accepted as true and convincing evidence.

As stated by Mr. Hepp for the then defendants (TR 203-216), the case was made by basing one presumption on to another by the government to secure conspiracy convictions.

Again it should be noted the handicap under which defense counsel labored in the lower court in not learning until the closing day of the trial of the ownership of the heroin so that a more timely motion to suppress could have been made.

The question and evidence to be considered is whether or not the airmail package which was searched and seized without a warrant is admissible. Certainly the evidence of the Postmaster Mrs. Boyle at (TR 76) cannot be given any other status than a mere conclusion.

The question still remains—whether this was a first class airmail package or a fourth class airmail package. In either event the appellants allege that their constitutional rights were violated by the unlawful search and seizure.

It is important, before argument, that a narration of events be included here.

Why the failure of the U. S. Marshal to secure a search warrant and legally seize the package containing the heroin instead of causing the same to be searched in the Fairbanks Post Office?

Robert Thompson (TR 44) testified he had requested the Postmaster to see if she "could locate this package in the mail". This was done in his then capacity as a U. S. Deputy Marshal. He told Mrs.

Boyle, the Postmaster, the type of package to look for (TR 45).

On December 16, 1955, Mrs. Boyle notified Thompson the package was there and the package was opened in her office with four persons being present, namely: Thompson, Boyle, Brady (TR 46) and Mr. Dorsch, the U. S. Marshal for the Fourth Division, Alaska.

After examination by the Marshals and the Postmaster, the package was left with the Post Office and returned to the General Delivery window (TR 52). Thompson stated he did not see the package again until he picked it up with a search warrant on December 20th. See also testimony of Mrs. Boyle (TR 71-76).

Theodore McRoberts (TR 85, et seq.) testified that he was a U. S. Deputy Marshal, first saw the package on December 17, 1957, while on watch for the same in the Post Office; that he saw a William Taylor receive the package and then took Taylor and the package to the Marshal's office. Later in company with Taylor, a cab driver, they took the package containing the heroin to a Clyde Jenkins in Taxi No. 15. McRoberts then entered the cab with Jenkins and the package and tried to deliver it and failed, returned to the Federal Building, went to a different address (TR 88-89) and Mr. McRoberts again returned the package to Mrs. Boyle at the Post Office.

All these shenanigans took place without an arrest being made and without procuring a search warrant. It was not until all efforts to deliver the package to

someone had failed that belatedly, and on December 20, 1957, that the U. S. Marshal procured a search warrant and seized the package that was apprehended, opened, searched and seized without a warrant in the period between December 16th and 20th.

ARGUMENT.

For the purposes of this brief, appellants will divide and argue the Statement of Points on Appeal (TR 37) as follows:

CONSPIRACY QUESTION.

Points 2, 3 and 6 will be considered in one argument. These embody a charge of error to the lower court in denying motions for acquittal at the close of the government's and defendant's case, and with reference to the conspiracy portion of Point 6.

These will not be urged in this Brief but are mentioned to allow counsel to argue these points on the hearing on appeal.

CONSTITUTIONAL QUESTION.

Points 1, 4, 5, a part of 6, and 7 will be considered herein as the actual basis for urging that lower court's judgment be reversed. We do not consider these points in the order of their listing.

Points 4 and 5. The lower court erred in denying appellants' motion to suppress the evidence contained

in Exhibits D, E, F, G, H, I, J and K, and erred in admitting the same into evidence.

The objections to the admission of the said exhibits were made as each was presented. See (TR 155-159), and motions to suppress their use as evidence were made as early as it was possible for counsel to make them. Motions to suppress the evidence were made even prior to the time that counsel learned that the Exhibits involved were claimed by any of then defendants.

Point 6 is considered here as to the lack of evidence as to the weight and classification of the package containing the heroin sent through the mail.

We submit that the evidence of Mrs. Boyle, the Postmaster at (TR 76) was no more than conjecture or a conclusion of the witness.

On Point 7 appellants base their most substantial claim for a reversal.

Point 7 alleges the opening of any sealed packages in the mail, without a warrant, as being unconstitutional.

We state this despite Part 135.7 of the Postal Regulations which provides:

> "Fourth class mail must be wrapped or packaged so that it can be easily examined. Mailing of sealed parcels at fourth-class rate of postage is deemed to be the consent of the sender to postal inspection of its contents. To assure that their parcels will not be opened for postal inspection, patrons should, in addition to paying the first-class rate of postage, plainly mark their parcels first class or with similar endorsements."

While in the case at bar it appears that airmail postage was paid, how many people know what the postal regulations are—and even knowing, is one to be bound by a mere regulation where a constitutional right of search and seizure of a person's private property is concerned.

Certainly this regulation (Part 135.7, supra) gives no right for the post office officials to seize the package at the U. S. Marshal's request and then call in the Marshals for the search. Appellants urge that Sections 243 and 700, U.S.C.A. 39 are unconstitutional as a violation of private rights, and if not, it is made unconstitutional by the bringing in of U. S. Marshals to inspect mail so opened.

39 U.S.C.A. 475 in defining *Air Parcel Post* does not designate this as being fourth class mail.

Ex Parte Jackson, 96 U.S. 727

was good law when it was made and is good law today. Parcel post facilities and air mail were unheard of in 1872 as we know them today. It is Appellants' contention that had the court at the time of *Ex Parte Jackson* been considering a package, rather than a letter, the result would have been the same to protect the right against unlawful search and seizure.

Of the few cases bearing upon our action, of greatest import is another involving the sending of heroin by air mail; and its search and seizure:

Oliver v. United States, 239 F. 2d 818,

and we quote from the syllabus as follows:

"1. *Searches and Seizures.* Protection against unreasonable search and seizure of one's papers

or other effects, guaranteed by the Fourth Amendment, extends in fitting manner to their presence in the mails. U.S.C.A. Const. Amend. 4."

"2. *Post Office.* Congressional measures or Post Office Department regulations covering inspections of mail can only be enforced consistently with rights reserved to people against unreasonable search and seizure. U.S.C.A. Const. Amend. 4."

"3. *Searches and Seizures.* If the field involved in a particular situation has been made the subject of greater legislative or administrative restrictions respecting scope or manner of exercising search and seizure privilege as to the field, question or reasonableness of search on general constitutional grounds may not be reached as the legislative measures and administrative regulations may themselves be determinative of the official impropriety or legal unfairness of the acts done. U.S.C.A. Const. Amend. 4."

"4. *Post Office.* Where inspection of Congressional Acts and administrative regulations respecting inspection of mails revealed that all mail on which first class postage has been paid was not subject to inspection, such statutes and regulations themselves were determinative of official impropriety or legal unfairness of inspecting first-class air mail packages without consideration of fundamental unfairness or unreasonableness on general constitutional grounds. U.S.C.A. Const. Amend. 4; 39 U.S.C.A. Sec. 250, 251; Air Mail Act, Sec. 2, 39 U.S.C.A. Sec. 462; 5 U.S.C.A. Sec. 22."

"5. *Criminal Law. Post Office.* Where wife mailed to her husband a first-class air mail pack-

age, the opening and inspecting of same by postal authorities, without a warrant, constituted an unreasonable search and seizure and conviction of wife based on evidence obtained thereby was reversed. 18 U.S.C.A. Sec. 1716; Narcotic Drugs Import and Exports Act, Sec. 2, 21 U.S.C.A. Sec. 174; 26 U.S.C.A. (I.R.C. 1954) Sec. 4704(a); Air Mail Act, Sec. 2, 39 U.S.C.A. Sec. 462; U.S.C.A. Const. Amend. 4."

"6. *Post Office.* Where matter seized by postal authorities inspecting a first-class air mail package was contraband, person mailing same had no right to have it returned even though authorities discovered its existence as result of unreasonable search and seizure. U.S.C.A. Const. Amend. 4."

In the instant case we contend that the defendant Ruby Field paid air mail postage on the package, it was sufficiently sealed, it contained no notation on the package authorizing postal authorities to open the same, or to call in the Marshals as was done in this instance.

As to the timeliness of application for the motion to suppress evidence, Rule 41(E) F.R.C.P. provides that "the Court in its discretion may entertain the motion at the trial or hearing."

Ganci v. U. S., 287 F. 60:

"2. A Motion to exclude evidence as having been procured through an unlawful and unconstitutional search and seizure, and which affects substantial rights, may be made, and must be ascertained, at any time prior to verdict."

and on page 67 citing *Gouled v. U. S.,* 255 U.S. 298, at top of page is stated:

> "A rule of practice must not be allowed for any technical reason to prevail over a constitutional right."

It is urged that a substantial question of constitutional right is involved in this action; that defendants' counsel moved to suppress the evidence within an hour after the defendant Ruby Fields disclosed to counsel that the package was hers and that there appear to be no Court decisions directly in point if the package is considered as fourth class mail as an air mail parcel.

CONCLUSION.

The manner in which the package was seized and searched and the unconstitutionality of the regulations and laws form the principal basis for appeal. However, counsel reserves the right to fully argue the whole case, as stated in Points on Appeal, when the matter is presented to the court.

We urge that there is a new question involved—does the Post Office Department have a right to open *any sealed package* where no consent is given, and if so does this allow the United States Marshal to use the Post Office as a pawn to make searches and seizures for them, where there is a way as provided in *Ex Parte Jackson,* supra, to secure and search said mail on its receipt by the addressee?

Certainly at the time of *Ex Parte Jackson* the court never envisioned the present day use of the mails.

And the question presented here was never considered in *Oliver v. U. S.,* supra.

We respectfully urge this Honorable Court to fully consider the matter at bar.

Dated, Fairbanks, Alaska,
November 25, 1957.

Respectfully submitted,
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